



4310-K6-P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Amendment to Program Comment to Avoid Duplicative Reviews for Wireless Communications Facilities Construction and Modification

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of Program Comment amendment.

SUMMARY: The Advisory Council on Historic Preservation has amended the referenced Program Comment which avoids duplicate reviews under Section 106 of the National Historic Preservation Act regarding telecommunications projects that undergo Section 106 review by the Federal Communications Commission under existing Nationwide Programmatic Agreements. The amendments extend the duration of the Program Comment, add agencies that can use the Program Comment, and provide for a monitoring system.

DATES: The amendments were adopted by the ACHP on September 24, 2015.

ADDRESSES: Address all questions concerning the Program Comment amendments to Charlene Vaughn, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 401 F Street, NW., Washington, DC 20001-2637. You may submit electronic questions to: cvaughn@achp.gov.

FOR FURTHER INFORMATION CONTACT: Charlene Vaughn, (202) 517-0207, cvaughn@achp.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108 (Section 106), requires federal agencies to consider the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which Federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 (Section 106 regulations).

Under Section 800.14(e) of those regulations, agencies can request the ACHP to provide a "Program Comment" on a

particular category of undertakings in lieu of conducting individual reviews of each individual undertaking under such category, as set forth in 36 CFR 800.3 through 800.7. An agency can meet its Section 106 responsibilities with regard to the effects of particular aspects of those undertakings by taking into account ACHP's Program Comment and following the steps set forth in that comment.

I. Background

On October 23, 2009, the ACHP issued the referenced Program Comment to the U.S. Department of Agriculture Rural Utilities Service (RUS), the U.S. Department of Commerce National Telecommunications and Information Administration (NTIA), and the Federal Emergency Management Agency (FEMA) to relieve them from conducting duplicate reviews under Section 106 when those agencies assist a telecommunications project subject to Section 106 review by the Federal Communications Commission (FCC). The FCC complies with its Section 106 responsibilities through its Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the FCC and the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (FCC NPAs).

For background on that original Program Comment, and its text before these amendments, please refer to 74 FR 60280 - 60281 (November 20, 2009).

On August 21, 2015, the ACHP received a request from RUS, NTIA, and the Federal Emergency Management Agency (FEMA) to amend the referenced Program Comment.

The issuance of the original Program Comment was intended to assist agencies to expeditiously allocate American Recovery and Reinvestment Act (ARRA) funds, which was done successfully. While the ARRA funds have been expended, new funding has been provided to agencies to expedite the deployment of broadband. Also, unless amended, the Program Comment would have expired on September 30, 2015.

The extension of the duration of the Program Comment is therefore necessary to continue streamlining the Section 106 review. In addition, several new agencies are now involved in these undertakings and need to be accommodated by the Program Comment to avoid delays in project approval. One of those agencies, FirstNet may or may not provide financial assistance for such towers and collocations in the future, but is the entity responsible for ensuring the building, deployment, and operation of the nationwide public safety broadband network, which will likely include

the construction of communications towers and the collocation of equipment on existing facilities.

Accordingly, the ACHP membership voted in favor of amending the Program Comment via an unassembled vote on September 24, 2015. The Program Comment has been amended to:

1. Allow all components of the Department of Homeland Security (DHS), the Federal Railroad Administration (FRA), the Federal Transit Authority (FTA), and the First Responder Network Authority (FirstNet) to use the Program Comment, and specify how to add new agencies to the Program Comment in the future;

2. Insert three new paragraphs explaining the purpose and need of the amendments listed above;

3. Extend the duration of the Program Comment to September 30, 2025;

4. Add a system to monitor the use of the Program Comment;

5. Cite Presidential Memoranda consistent with the streamlining intent of the Program Comment; and

6. Add technical edits to reflect the effective date of these amendments and changes to the statutory citation to Section 106 of the National Historic Preservation Act.

RUS sought input from stakeholders on the proposed amendments to the Program Comment. Thereafter, the ACHP became more directly involved in the consultation by holding meetings, requesting and considering comments by stakeholders, holding conference calls with them, and making changes to the draft amendments accordingly. Overall, the majority of State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), and Indian tribes that commented endorsed the amendment of the Program Comment.

Comments from several stakeholders raised issues beyond the amendments outlined above. Since addressing those issues in the text of the Program Comment itself would unnecessarily clutter it, those issues are addressed in this Federal register preamble instead. These issues are:

1. How the scope of the Federal Communications Commission (FCC) Nationwide Programmatic Agreements does not include federal or tribal lands, and therefore the scope of the Program Comment is similarly limited. The FCC NPAs, by their own terms, do not apply on tribal lands. Since this Program Comment relies on compliance carried out by the FCC through the FCC NPAs, the Program Comment would similarly not cover these undertakings on tribal lands.

Regarding the applicability of the Program Comment on federal lands, it must be noted that of the roughly 635-640 million acres of federal lands, 628 million acres are managed by the Forest Service, the National Park Service, the Bureau of Land Management, the Fish and Wildlife Service, and the Department of Defense. "Federal Land Ownership: Overview and Data," Congressional Research Service, February 8, 2012. The Program Comment does not apply to any of these agencies or other agencies typically known as land managing agencies. When these land managing agencies issue special use permits, or other approvals, for the construction or location of telecommunications facilities on the lands they manage, they have to comply with Section 106 through means other than the FCC NPAs or this Program Comment.

2. How the Program Comment relies on FCC compliance with Section 106 for the same projects through their Nationwide Programmatic Agreements, and their e-106 and Tower Construction Notification Systems. The Program Comment exempts the named agencies from having to separately comply with Section 106 regarding certain telecommunications facilities and collocations when the FCC has or will comply with Section 106 for those same facilities and collocations through its NPAs. The FCC

conducts such Section 106 compliance following the processes and exemptions of those NPAs, and using its related e-106 system and Tower Construction Notification System (TCNS) which are known to most practitioners. Some SHPO stakeholders wanted us to note that some of them do not use the FCC's e-106 system.

3. How the Program Comment, as originally issued and as amended, has always required subject agencies to inform the SHPOs and THPOs or Indian Tribes when their undertakings are covered by this Program Comment. As stated in Section IV of the original Program Comment: "Whenever RUS, NTIA, or FEMA uses this Program Comment for such undertakings, RUS, NTIA or FEMA will apprise the relevant State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) of the use of this Program Comment for the relevant communications facilities construction or modification component." The amended Program Comment retains this language, with changes to simply note the new agencies that are now being added to the Program Comment.

On a somewhat related note, some SHPOs raised concerns about the need to address the effects of the non-tower components of undertakings. As specified in the second paragraph of Section IV of the Program Comment, the RUS,

NTIA, DHS, FRA, FTA, FirstNet are responsible for the Section 106 review of those non-tower components of their undertakings.

4. The purpose, and success, of the original Program Comment in the context of the American Recovery and Reinvestment Act (ARRA). In 2009, the American Recovery and Reinvestment Act (ARRA) provided NTIA and RUS with \$7.2 billion to expand access to broadband services in the United States. The purpose of the original Program Comment was to expedite broadband expansion by relieving these agencies from conducting duplicate Section 106 reviews when those agencies have Section 106 responsibilities for a telecommunications project subject to Section 106 review by the FCC.

Since it went into effect, the Program Comment has met this purpose. The Program Comment helped RUS, NTIA, and FEMA to spend their ARRA funding for broadband deployment without unnecessary delays. The success of the Program Comment is also reflected in the agencies' request to expand its duration and add new agencies to it.

Finally, the ACHP has not received complaints about the implementation of the Program Comment. The amendments nevertheless, provide for a monitoring system to better ensure the Program Comment is working as intended.

5. How the FCC handles discovery situations under its Nationwide Programmatic Agreement. Since the Program Comment relies on FCC compliance with its NPAs, the discovery provisions of those NPAs are the ones that will be followed for the relevant projects. The discovery provision of the FCC Nationwide Programmatic Agreement is found on its Section IX. A copy of that agreement can be found at: http://www.achp.gov/docs/PA_FCC_0804.pdf.

II. Final Text of the amended Program Comment

The text of the amended Program Comment is included below:

Program Comment for Streamlining Section 106 Review for Wireless Communications Facilities Construction and Modification Subject to Review Under the FCC Nationwide Programmatic Agreement and/or the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (as amended on September 24, 2015) .

I. Background

Due to their role in providing financial assistance and/or carrying out other responsibilities for undertakings that involve the construction of communications towers and collocation of communications equipment on existing facilities, the Rural Utilities Service (RUS), the National Telecommunications and Information Administration (NTIA),

the Department of Homeland Security (DHS), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), and the First Responder Network Authority (FirstNet) are required to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations at 36 CFR part 800 (Section 106 review) for such undertakings. Some of those communications towers and antennas are also federal undertakings of the Federal Communications Commission (FCC), and therefore undergo, or are exempted from, Section 106 review under the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the FCC (FCC Nationwide PA) and the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (FCC Collocation PA). The FCC Nationwide PA was executed by the FCC, the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) on October 4, 2004. The FCC Collocation PA was executed by the FCC, ACHP, and NCSHPO on March 16, 2001. The undertakings addressed by the FCC Nationwide PA primarily include the construction and modification of communications towers. The undertakings addressed by the FCC Collocation

PA include the collocation of communications equipment on existing structures and towers.

This Program Comment is intended to streamline Section 106 review of the construction and modification of communications towers and antennas for which FCC and RUS, NTIA, DHS, FRA, FTA, or FirstNet share Section 106 responsibility. Such streamlining is consistent with the broad purpose of the Presidential Memorandum: Unleashing the Wireless Broadband Revolution dated June 28, 2010, Executive Order 13616: Accelerating Broadband Infrastructure Deployment, dated June 14, 2012, and the Presidential Memorandum: Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training, dated March 23, 2015.

The term "DHS," as used in this Program Comment, refers to all of that agency's operational and support components. For a list of such components, you may refer to: <http://www.dhs.gov/components-directorates-and-offices>.

Nothing in this Program Comment alters or modifies the FCC Nationwide PA or the FCC Collocation PA (collectively, the FCC NPAs), or imposes Section 106 responsibilities on the FCC for elements of a RUS, NTIA, DHS, FRA, FTA, or FirstNet undertaking that are unrelated to a communications

facility within the FCC's jurisdiction or are beyond the scope of the FCC NPAs.

The Program Comment, as originally issued in October 23, 2009, only covered RUS, NTIA, and the Federal Emergency Management Agency (FEMA). Because of the successful implementation of this Program Comment, as originally issued, the DHS sought to expand its participation beyond FEMA to all of its components which provide federal assistance for the construction and modification of communications towers, and the collocation of communications equipment on existing structures and towers. Three additional agencies, the FRA, which supports railroading with funding that may be used to improve safety and rail infrastructure, the FTA, which provides financial assistance to eligible applicants to support public transportation, and FirstNet, an independent authority within the NTIA that was created by Congress in 2012, also wished to become part of Program Comment in order to benefit from the efficiencies in the timely delivery of their respective programs.

DHS, FRA and FTA provide financial assistance to applicants for various undertakings, including the construction of communications towers and collocation of communications equipment on existing facilities.

Conversely, FirstNet is the entity responsible for ensuring the building, deployment, and operation of the nationwide public safety broadband network, which will likely include the construction of communications towers and the collocation of equipment on existing facilities. DHS, FRA, FTA and FirstNet must therefore comply with Section 106 for these undertakings. Some of the communications towers and collocated communications equipment assisted by DHS components, FRA, FTA and FirstNet are also the FCC's undertakings, and therefore undergo Section 106 review governed by the FCC NPAs.

Accordingly, the ACHP amended this Program Comment on September 24, 2015, to add all DHS components, FRA, FTA and FirstNet to the list of agencies subject to the terms of the Program Comment along with RUS, NTIA, and FEMA, and to extend its period of applicability, which originally would have ended on September 30, 2015.

II. Establishment and Authority

This Program Comment was originally issued by the ACHP on October 23, 2009 pursuant to 36 CFR 800.14(e), and was subsequently amended, effective on September 24, 2015 pursuant to its Stipulation VI.

III. Date of Effect

This Program Comment, as originally issued, went into effect on October 23, 2009. It was subsequently amended to its current version on September 24, 2015, effective on that date.

IV. Use of This Program Comment to Comply With Section 106 for the Effects of Facilities Construction or Modification Reviewed Under the FCC Nationwide PA and/or the FCC Collocation PA

RUS, NTIA, DHS, FRA, FTA, and FirstNet will not need to comply with Section 106 with regard to the effects of communications facilities construction or modification that has either undergone or will undergo Section 106 review, or is exempt from Section 106 review, by the FCC under the FCC Nationwide PA and/or the FCC Collocation PA. For purposes of this program comment, review under the FCC Nationwide PA means the historic preservation review that is necessary to complete the FCC's Section 106 responsibility for an undertaking that is subject to the FCC Nationwide PA.

When an RUS, NTIA, DHS, FRA, FTA, or FirstNet undertaking includes both communications facilities construction or modification components that are covered by the FCC Nationwide PA or Collocation PA and components other than such communications facilities construction or modification, RUS, NTIA, DHS, FRA, FTA, or FirstNet, as

applicable, will comply with Section 106 in accordance with the process set forth at 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or another applicable alternate procedure under 36 CFR 800.14, for the components other than communications facilities construction or modification. However, RUS, NTIA, DHS, FRA, FTA, or FirstNet will not have to consider the effects of the communications facilities construction or modification component of the undertaking on historic properties.

Whenever RUS, NTIA, DHS, FRA, FTA, or FirstNet uses this Program Comment for such undertakings, RUS, NTIA, DHS, FRA, FTA, or FirstNet will apprise the relevant State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) of the use of this Program Comment for the relevant communications facilities construction or modification component.

V. Reporting

No later than March 1, 2016, the FCC, RUS, NTIA, DHS, FRA, FTA, and FirstNet will inform the ACHP as to the reporting system that they will utilize to collectively provide annual reports to the ACHP. The intent of the annual reports will be to enable the monitoring of the use of the Program Comment.

VI. Amendment

The ACHP may amend this Program Comment after consulting with FCC, RUS, NTIA, DHS, FRA, FTA, FirstNet, and other parties, as appropriate and publishing notice in the Federal Register to that effect.

If any other Federal agency wishes to take advantage of this Program Comment, it may notify the ACHP to that effect. An amendment, as set forth above, is needed in order to add such an agency to this Program Comment.

VII. Sunset Clause

This Program Comment will terminate on September 30, 2025, unless it is amended to extend the period in which it is in effect.

The ACHP may extend the Program Comment for an additional five years beyond 2025 through an amendment per Stipulation VI of this Program Comment.

VIII. Termination

The ACHP may terminate this Program Comment, pursuant to 36 CFR 800.14(e)(6), by publication of a notice in the Federal Register thirty (30) days before the termination takes effect.

Authority: 36 CFR 800.14(e)

Dated: September 24, 2015.

Javier E. Marques,

Associate General Counsel

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